COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

VERIZON NEW ENGLAND INC. D/B/A VERIZON MASSACHUSETTS PERFORMANCE ASSURANCE PLAN	DTE 03-50

OPPOSITION OF AT&T OF NEW ENGLAND, INC. TO MOTION OF VERIZON MASSACHUSETTS FOR CONFIDENTIAL TREATMENT

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Introduction

AT&T Communications of New England, Inc., ("AT&T") herein files its opposition to Verizon Massachusetts's ("Verizon") August 11, 2003, *Motion for Confidential Treatment* ("Motion") in the above referenced proceeding.

Verizon has requested protection under M.G.L. c. 25, § 5D, for information quite unlike any information for which such claims are typically made at the Department of Telecommunications and Energy ("Department"). Unlike information related to marketing strategies, potential customers, location of telecommunication facilities and other competitively sensitive information in the telecommunications industry, the information at issue here relates only to the method by which Verizon complies with its legal obligations under the Massachusetts Performance Assurance Plan ("PAP"). In short, it is uniquely and solely information related to regulatory compliance.

Moreover, Verizon has made conclusory, unsupported and, in fact, untrue assertions in support of its request to the effect that other parties will be able to obtain access to the information for which protection is sought to the extent necessary in regulatory proceedings. In fact, Verizon seeks to impose restrictions on the ability of other parties to use the information for which protection is sought that goes far beyond those typically required at the Department and far beyond anything Verizon legitimately requires to protect its own interest. The restrictions that Verizon seeks to impose would prevent other parties from monitoring and verifying Verizon's regulatory compliance. In short, the restrictions would undercut the very purpose for which such information must be provided to the other parties.

The motion asks the Department to grant protective treatment for a computer program that calculates Verizon's performance in accordance with legally required metrics, based on

ordering, provisioning, and maintenance data. The computer program is essentially a computer program that models the Carrier-to-Carrier Metric Algorithms ("CMAs"). The CMAs, in turn, are Verizon's step by step procedure that specifies what operations must be done to what data fields in what sequence in order to calculate a performance metric. It is difficult to understand why Verizon's interpretation of its legal obligation under the PAP (*e.g.*, which data fields should be used to calculate a particular metric) constitutes competitively sensitive, proprietary information. Indeed, such information is inherently public and of public concern. Moreover, the use restrictions that Verizon would impose on other parties, such as the Competitive Local Exchange Carriers ("CLECs"), would substantially restrict their ability to obtain and use the information necessary to replicate the carrier metrics.

As justification for its imposition of the use restrictions, Verizon claims that this strict level of protection is required to prevent "unfair economic and competitive disadvantage" to Verizon.[1] Moreover, it claims that such restrictions are necessary to protect its copyright and intellectual property rights. Verizon, however, fails to provide any support for how, or in what way, it will suffer commercial harm. Clearly this is not a situation in which third parties could use the information to take advantage of telecommunications marketing opportunities that the information discloses. Verizon's only claim is that "consultants" could use the information to develop computer code to sell to the limited market of CLECs interested in Verizon's compliance with its legal obligations. Apart from the fact that such an argument is overbroad and applies to much information produced in regulatory proceedings, it does not make logical sense in the instant case. If, as Verizon claims, the CLECs can make legitimate use in regulatory

[1] *Motion*, at 4.

proceedings of the information in question under the restrictions it imposes, there would be no "market" for consultants to sell to. Verizon's circular argument demonstrates that the information at issue is public information necessary to determine regulatory compliance.

In addition, Verizon's Motion, Protective Agreement and License Agreement[2] restrict the ability for CLECs to challenge Verizon's claimed wholesale metrics in regulatory, judicial, and other enforcement proceedings. A copy of the Verizon Protective Agreement is attached as Exhibit 'A.' AT&T has declined to enter into similar CMA restrictive use protective agreements in other jurisdictions.

Accordingly, the Department should deny Verizon's Motion outright. Should the Department nonetheless grant Verizon's Motion, it should ensure that its order is narrowly tailored to Massachusetts law, specifically M.G.L. c. 25, § 5D. A grant of protection from public disclosure under M.G.L. c. 25, § 5D, need not address the terms under which interested parties in regulatory proceedings can gain access to such information for legitimate regulatory purposes. Going beyond the narrow issue of protection of documents in the possession of the state government from public disclosure under Massachusetts law could upset the discussions and proceedings related to this issue now taking place in other jurisdictions.

Argument

The CMAs sought to be protected by Verizon underlie the calculation of each reported PAP metric result. The CMAs contain both the algorithm, which is essentially a recitation of the inputs, omissions, and other variables *i.e.* procedures Verizon followed in arriving at its reported metrics (also referred to as 'Business Rules'), as well as the computer code created by its

programmers to include the algorithms. Receipt of the algorithms, along with the raw data for each metric, is absolutely essential for CLECs to replicate each metric calculation such that they can verify Verizon's calculations. For instance, with respect to the Carrier-to-Carrier Guidelines, the PR-1metric has an exclusion for "Retail Suspend for non-payment and associated restore orders." Yet the PR-3 metric has an exclusion for "Suspend for non-payment and associated restore orders." Only by examining the algorithm that Verizon uses to calculate the metric, is it possible to determine whether, in PR-3, Verizon is implementing "Suspend" orders so as to include only CLEC retail orders, wholesale orders, or both.

CLECs cannot independently make these determinations unless they can see the CMAs. Moreover, if they find that Verizon's CMAs do not provide for a calculation that is consistent with the metric, they cannot test the impact of Verizon's interpretation and present the results to the Department, or any other court or agency of competent jurisdiction, under the restrictions that Verizon seeks to impose

So important are CMAs to CLECs' ability to verify Verizon's metrics, as AT&T noted in its *Letter in Lieu of Comments* in this proceeding as pertains to the annual audit requirement,[3] the New York PSC ("NYPSC") recently ordered Verizon to provide the algorithms and recognized that CLECs must have access to sufficient information regarding Verizon's data. Specifically, the NYPSC held that:

(continued...)

[2] *See* D.T.E. 03-50, Protective Agreement, and Protective Agreement Attachment A, License Agreement (collectively "Protective Agreement").

[3] D.T.E. 03-50, Annual Audit, *Letter in lieu of Comments of AT&T Communications of New England ,Inc*., August 11, 2003, at 5.

> Given that the queries define the basis for the metric calculations, electronically providing the CLECs with specific query statements along with the raw data used to generate the metric results each month should facilitate the CLECs' ability to replicate reported results, and also lessen confusion regarding how the metric guidelines are being reported by Verizon.[4]

As the NYPSC underscored, CLECs' ability to replicate the Verizon wholesale metrics is entirely dependant upon Verizon not attempting to encumber the use of the CMAs.

As more fully described below, the use restrictions sought to be imposed by Verizon's Motion would unreasonably and unjustifiably thwart CLECs' ability to replicate Verizon's reported wholesale metrics. Additionally, the use restrictions would essentially prevent CLECs from the ability to challenge Verizon's findings in regulatory or judicial enforcement proceedings- contrary to the entire purpose of the PAP enforcement regime.

I. THE CMAS DO NOT CONSTITUTE TRADE SECRETS, CONFIDENTIAL, COMPETITIVELY SENSITIVE, OR OTHER MATERIAL SUBJECT TO PROTECTION UNDER M.G.L. C. 25, § 5D.

Pursuant to M.G.L. c. 25, § 5D, there is a presumption that the information for which protection is sought is public information, and the burden shall be upon the proponent of such protection to prove the need for such protection.[5] Verizon's Motion seeks confidential protection of the CMAs, claiming the CMAs as "trade secret or confidential, competitively sensitive, proprietary information" (internal quotation marks omitted). [6] Verizon's unsupported categorization of the CMAs is mistaken in this regard. As further discussed below, the CMAs

[4] Case 99-C-0949, Petition filed by Bell Atlantic-New York for Approval of a Performance Assurance Plan and Change Control Assurance Plan filed in C97-07-0271, Order issued January 24, 2003, at 3-4.

[5] M.G.L. c. 25, § 5D.

[6] *Verizon Motion*, at 1.

have no competitive value, and exist solely to ensure Verizon's compliance with the PAP metrics. Moreover, hardly confidential, Verizon has previously disclosed information similar to the CMAs in a public forum. Lastly, Verizon's claims that the CMAs constitute "protected copyrighted and intellectual property"[7] are misplaced. Verizon, either overtly or through implication, is thus attempting to force CLECs to concede Verizon's intellectual property rights in the CMAs- against CLECs' legal interests and interpretation.

Verizon's argument that the CMAs constitute "confidential" information is not supported by the facts.[8] In fact, in New Jersey Verizon has hundreds of pages of business rules substantially similar with the CMAs on the state website, without any protective agreement requirement.[9] While the structure of the New Jersey Performance Incentive Plan ("PIP") varies from the Massachusetts PAP, the Carrier-to-Carrier metrics are substantially similar. There is no material difference between both states' metrics that should permit one to be publicly available, yet require that the other be subject to draconian use and availability restrictions. Indeed, certain of the metrics are identical. It is difficult to understand why identical information in New Jersey and Massachusetts should be "confidential" in Massachusetts but not in New Jersey. Indeed, given that the information for the metrics that are identical in Massachusetts and New Jersey is already published and publicly available in New Jersey, it is hard to understand how Verizon would suffer "damages" if it were disclosed here.

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[7] *Protective Agreement*, at 1.

[8] *Id.*, at 4.

[9] *See* `http://www.bpu.state.nj.us/home/telecommunications.shtml;`

Moreover, unlike circumstances under which parties have traditionally sought protection from the Department under M.G.L. c. 25, § 5D, in this instance Verizon has failed to demonstrate why the CMAs should be protected from disclosure to CLECs. Despite its unsupported claims to the contrary, this circumstance is not one where Verizon would be disclosing information that would have any true competitive sensitivity. In fact, the CMAs are of a completely different nature and character from the competitively sensitive information the Department has previously considered to be worthy of protection from public disclosure, *e.g.*, revenue figures, customer names, facility locations, marketing strategies, *etc.* The CMAs were created by Verizon for the *sole purpose* of measuring its compliance with the terms of this regulatory proceeding, *e.g.*, ensuring nondiscriminatory wholesale provisioning to CLECs. Treating the CMAs as property of Verizon, with the concomitant ability of Verizon to control their use in regulatory proceedings, defeats the entire purpose of the PAP enforcement regime.

Verizon's assertion that protection is required under M.G.L. c. 25, § 5D to prevent "unfair economic and competitive disadvantage" to Verizon is baseless.[10] The CMAs are not a commercial product that Verizon claims it developed with the intent to market and sell. Rather it concedes that the CMAs were created by Verizon "for a very specific purpose within the Company,"[11] *e.g.*, to have the ability to measure its compliance with the PAP guidelines. Moreover, Verizon has failed to allege that competitors would have any commercial interest in developing products similar to the CMAs for commercial sale. In fact, the only commercial value of the CMA is for use within the PAP proceedings- certainly not in the general marketplace.

[10] *Motion*, at 4.

[11] *Id.*, at 4.

Indeed, to the extent that CLECs developed their own CMAs, they would not do so for commercial gain, but only for the specific purpose of verifying Verizon's CMA wholesale metrics.

Astoundingly, Verizon argues that it could suffer harm from a consultant who "could obtain [the CMAs] at no cost" and provide them to CLECs for commercial gain.[12] Verizon's claim here is in actuality a self-fulfilling prophecy. Only by refusing to provide the CMAs to CLECs does Verizon create a market for consultants or other parties. As described above, the CMAs have value in regulatory or enforcement proceedings. If Verizon simply provided the CMAs to CLECs without onerous and untenable use restrictions in accordance with the PAP, there would be no market for consultants or any other party.

As a further attempt to demonstrate potential harm it would suffer, Verizon additionally claims that CLECs should have to also bear the burden of creating their own CMAs. Verizon claims that:

> [I]f the CMAs are made publicly available, no CLEC would have to incur the time and expense necessary to develop comparable intellectual property. If the CMAs are not protected, any person or company, in addition to CLECs, could obtain the code.[13]

Verizon's claim of competitive disadvantage, if the CMAs were not subject to proprietary use restrictions, is entirely misplaced. Essentially, Verizon argues that the harm it would incur from disclosure of the CMAs to CLECs, would constitute the fact that CLECs would not have to create the CMAs themselves. Verizon's argument, however, that CLECs would thus derive some form of unjust benefit from receipt of the CMAs *gratis* fails for two reasons. First, as

[12] *Motion*, at 4.

[13] *Id.*

noted above, the CLECs obtain no commercial benefit from the CMAs. Their only use is to monitor Verizon's regulatory compliance. Second, the expense claimed to be incurred by Verizon was for demonstrating a non-discriminatory operational support services ("OSS") and backsliding program as essential prerequisites for state and federal 47 U.S.C. § 271 approval. Verizon's argument that CLECs would somehow be unjustly enriched if they find out how Verizon is meeting its conditions for obtaining its lucrative Section 271 is a logical *non sequitur*. Verizon's claim that it would be at a competitive disadvantage if it alone must create the CMAs entirely misses the point. The metrics were created in the first instance as a means or making it possible for Verizon to enjoy the financial benefits from entering the long-distance market.

One way to understand the difference between competitively sensitive information for which the department grants protection, and the CMAs at issue here, is to consider the difficulty of determining a time limitation on the grant of protection. In recent years, the Department has been careful to grant protection for a limited period of time only, on the grounds that the competitively sensitive information grows stale and loses its competitive sensitivity. How would the Department apply such consideration to the CMAs when their only value derives from regulatory compliance? Verizon would have the Department rule that the CMAs are protected from public disclosure for as long as they have a public purpose. The Department should not countenance such request.

For these reasons, Verizon's claim that the CMAs are entitled to the statutory protection afforded under M.G.L. c. 25, § 5D is misguided, and its motion should be rejected on its face.

II. VERIZON FAILS IN ITS MOTION TO ENSURE THAT THE GRANT OF THE PROTECTION SOUGHT WOULD NOT RESTRICT THE ABILITY OF CLECs TO REPLICATE THE CARRIER METRICS.

As discussed herein, the Verizon Protective Agreement contains substantial use restrictions. These restrictions include, without limitation, Verizon allowing disclosure of only one copy of the CMAs to each CLEC, [14] and preventing the CMAs from being further copied or distributed. [15] Thus, even apart from the intellectual property and licensing restrictions asserted by Verizon, the restrictions and omissions contained in the Proprietary Agreement, especially the restriction that only one copy can be made, essentially obviate CLECs ability to use the CMAs in any meaningful way to replicate Verizon's wholesale findings. Accordingly, Verizon's offer to disclose the CMAs to CLECs subject to the Protective Agreement is of little value.

At its essence, by imposing use restrictions on the CMA's, Verizon renders the algorithms of little practical benefit CLECs. As discussed above, other than the unsupported assertion that it would be at a competitive disadvantage, Verizon offers little or no support demonstrating the need for such stringent restrictions. For example, Verizon provides absolutely no support for its restriction on CLECs to receive more than one copy of the CMAs or to make further duplications thereof- despite the fact that such restrictions will materially impair the ability for CLECs business groups to replicate Verizon's claimed metric results.

Even if CLECs could manage to use the CMAs in accordance with Verizon's self-imposed restrictions, Verizon has declared that the CMAs may only be used for an unreasonably narrow purpose. Indeed, the Protective Agreement mandates that the CMAs may only be used

[14] *Id*., at 3.

[15] *Id.*

"as an additional support tool for understanding the business rules contained in the New York Carrier to Carrier Guidelines."[16] Accordingly, CLECs would be prevented from using the CMAs, or any portion thereof, in any regulatory or judicial enforcement proceeding given the use restrictions over the CMAs- *including this very proceeding*.

Otherwise stated, by seeking to impose its use restrictions, Verizon would specifically preclude CLECs' ability to challenge the results of Verizon's reported wholesale metrics results. This result would run entirely contrary to the purpose of a carrier metrics, detrimentally weakening the regulatory process upon which the PAP enforcement regime is based.

Moreover, Verizon's assertion of ownership rights over the CMAs under the Licensing Agreement, could subject CLECs to infringement claims for even attempting to create their own CMAs. As discussed above, Verizon's mandated Protective Agreement characterizes the CMAs as "protected copyrighted and intellectual property."[17] Unlike confidential information or trade secrets, intellectual property and copyright claims include, at their essence, some sense of ownership right to prevent others from using the information even if they develop the information independently. Thus, even if CLECs created their own computer code independently, Verizon could claim infringement. Given that very real danger, AT&T does not want to sign a protective agreement of the sort Verizon offers here, because it could permit Verizon to claim that AT&T has conceded Verizon's intellectual property rights over the CMAs when it executed the Protective Agreement.

[16] *Protective Agreement*, Attachment A.

[17] *Protective Agreement*, at 1.

By including the algorithms in tandem with the computer code, Verizon has created the intellectual property issues it now seeks to 'remedy' through the onerous use restrictions. The net effect of Verizon's claimed copyright and intellectual property rights is as follows: if CLECs attempt to use the CMAs to replicate Verizon's results, because Verizon has commingled the two, CLECs would not be able to view the Verizon algorithms without concurrently viewing the computer code. As a result, CLECs could be subject to potential infringement claims by Verizon. Accordingly, while Verizon is on one hand claiming it would be at a competitive disadvantage since CLECs would not have to expend their own resources to create the CMAs, on the other hand, Verizon assertion that the computer code is intellectual property capable of being licensed actually prevents CLECs from developing their own code. If such code were "intellectual property" that can be licensed, Verizon might claim that code independently developed to do the same thing infringes on its intellectual property rights.

Although AT&T vigorously disputes that the CMAs at issue here are information that is entitled to protection from public disclosure for the reasons discussed above, if such protection were granted, there is nothing inherent about Verizon's claimed intellectual property rights over the CMAs that would make conventional protective agreements inappropriate in this circumstance. So long as the CMAs are not disclosed in the public domain, Verizon's rights would be protected. Especially in this case, where as discussed above CLECs would have no interest in using the CMAs for commercial gain, such onerous use restrictions are obstructionist and unnecessary. A typical requirement that the CMAs could only be used within the scope of this or any other PAP related judicial or regulatory proceeding would more than suffice to protect Verizon's intellectual property concerns as set forth in its Motion.

III. SHOULD THE DEPARTMENT GRANT VERIZON'S MOTION, IT SHOULD ENSURE THAT THE ORDER BE NARROWLY DRAFTED SO AS NOT TO DISRUPT PROCEEDINGS IN OTHER JURISDICTIONS.

Verizon's condition for access to the information, that CLECs enter into the Protective Agreement, is not unique to Massachusetts. Rather, as explained above, this issue has been the subject of ongoing discussions in New York for some time. Accordingly, CLECs have had sufficient time to understand the implication of Verizon's use restrictions in New York that are substantially similar to those Verizon seeks to impose upon CLECs in Massachusetts through the Protective Agreement.

In fact, the licensing and intellectual property issues arising out of the CMAs have been the subject of recent considerable discussions in the Carrier Working Group ("CWG"). Given these discussions, Verizon has previously suggested to other jurisdictions that the prudent course of action would be to allow the CMA use issue to be resolved in accordance with those discussions.

In fact, in the proceeding regarding Verizon Rhode Island's suggested modifications to that state's PAP, Verizon recommended that the Rhode Island Public Utilities Commission ("RIPUC") "refrain from forcing the [CMA] issue."[18] Rather, Verizon recommended that the issue should be resolved by the NYPSC and the CWG.[19]

A favorable ruling by the Department in Massachusetts pursuant to M.G.L. c. 25, § 5D, could be more broadly misunderstood by other jurisdictions as a decision on the substantive merits of the CMA use restriction issue. Thus, if the Department does grant the Verizon Motion

[18] RIPUC Docket 3256, *Reply Comments of Verizon Rhode Island*, July 30, 2003, at 8.

[19] *Id.*

notwithstanding AT&T's firmly held position that the information for which protection is sought is not commercial information entitled to such protection, it should ensure that the order is narrowly drafted to avoid potential misuse by Verizon in other jurisdictions. Accordingly, if the Department were to grant Verizon's motion that the information at issue be protected from public disclosure, the Department should make clear that it is not ruling on the appropriateness of the restrictions that Verizon seeks to impose on the use of such information in regulatory proceedings.

Conclusion

For the reasons stated herein, AT&T requests that the Department deny Verizon's Motion, or at a minimum, limit the ruling to the narrow issue of whether the information should be protected from public disclosure under Massachusetts law.

Respectfully submitted,

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